NO. 48898-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KYLE S. BRYCELAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00059-1

BRIEF OF RESPONDENT

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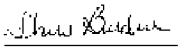
SERVICE		
	Catherine Glinski P.O Box 761 Manchester, WA 98353 Email: glinskilaw@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 4, 2017, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kyle S. Bryceland was charged by original information filed in Kitsap County Superior Court with robbery in the first degree. CP 1. Before trial, the information was amended adding an accomplice allegation to the robbery count and adding a second count of driving with license suspended in the second degree. CP 18-19. Bryceland pled guilty to the second count. CP 45; 1RP 64.

Pretrial, a hearing was had under CrR 3.5 to consider the admissibility of statements Bryceland made to law enforcement. 1RP 27. The trial court entered Findings of Fact and Conclusions of Law. CP 42 *et seq.* Therein, the trial court found that prior to being interviewed

Bryceland had been advised of his rights and that he understood them. Id. Following advisement, Bryceland agreed to be interviewed by the attending detective. CP 43. From these findings, the trial court ruled that Bryceland's statements to Detective Thuring are admissible. Id.

Also pretrial, there was much discussion of the admissibility of recordings of jail phone calls between Bryceland and an unidentified voice. CP 98; Exhibit 35. The transcript of the admitted portions of the call run for 12 pages. Bryceland and the other were discussing Bryceland's case. Id. The defense objected to two portions of the call. First, at 1RP 47, the defense objected to the following exchange:

> Female voice: Well ...you know...you just gotta really think like what is gonna prove your innocence. How...how you gonna prove this to people who are gonna sit there and interrogate you? Why were you here? You have to come up with ...with like an answer.
>
> Male voice: Ah well. I came up with all that already (inaudible).

CP 106. The trial court ruled that that excerpt did not involve any state action that Bryceland was aware that the calls were recorded, that the statement did not constitute a comment on Bryceland's right to remain silent, and that it is relevant on the state's theory that the excerpt is an adoptive admission showing consciousness of guilt. 1RP 52.

Second, the defense objected to the entire transcript but did not argue why the entire transcript should be excluded. 1RP 92. At the same time, the defense made a more specific objection to Bryceland saying "But

I bet you Hunter's [Hunter Trerise the victim] not going to come. Hunter's not going to come to trial." CP 106 (alteration added). Again, the trial court ruled that the passage is admissible it being relevant and there being no violation of ER 403 as cumulative or too prejudicial. 1RP 95-96. Some other passages of the jail calls were omitted by agreement of the parties, including a reference to Bryceland having an attorney and that the attorney could take care of some things in the case. 1RP 97 (trial court rules that the passage about the attorney is inadmissible).

The trial court instructed the jury on accomplice liability. CP 66 (instruction 8). The instruction requires the state to prove that Bryceland with knowledge that his actions would promote or facilitate the crime, either aids or agrees with another in planning or committing the crime. Further, aiding is established by all assistance whether by words, acts, encouragement, support, or presence. Being present and ready to assist establishes aiding.

The jury found Bryceland guilty. CP 70. He was sentenced to the low end of the 31-41 month standard range. This appeal was timely filed. CP 90.

B. FACTS

Hunter Trerise testified that he lives in Bremerton, Washington at

the intersection of Naval Ave. and 8th Street. 2RP 127. He had known defendant Bryceland for a long time. 2RP 128. He also knew codefendant Christopher Jones before the incident. Id. On the incident date, Mr. Trerise and his friend Devon Klug had arranged to go to Jones's house to "smoke and hang out and chill." 2RP 129. Trerise called Bryceland for a ride. Id.

Bryceland picked up Messrs. Trerise and Klug at Trerise's house. 2RP 130. Angelo [codefendant Angelo Lundy] was with Bryceland and was riding in the back seat when the other two were picked up. Id. The car turned around and headed up the street when Bryceland said something about putting a backpack in the trunk of the car. 2RP 131. Bryceland pulled the car into an alley behind Trerise's house. 2RP 132. Bryceland had said that the backpack was bothering him but it was in the backseat. 2RP 133. Angelo picked up the backpack and he and Bryceland got out of the car. Id.; 2RP 134. The two went to put stuff in the trunk. Id.

Just then, Mr. Trerise saw someone coming down the alleyway. 2RP 134. As the person was coming down the alleyway, the person "kind of like beelined" to Mr. Trerise's window and stuck a gun in the open window. 2RP 135. The gun was pointed directly at Mr. Trerise. 2RP 137. The person said "give me everything you have." 2RP 136. The assailant was wearing dark clothing with a bandana over his face (a black

bandana was later found in the suspect vehicle when police searched it, 3RP 335). 2RP 137. Mr. Trerise saw enough skin to determine that the assailant was a black person. Id. Mr. Trerise was shocked by the gun being pointed at him and he "gave him everything I had." 2RP 138. Both Mr. Trerise and Devon Klug got out of the car. 2RP 138. Mr. Trerise left a silver bracelet, a diamond studded watch, and his phone in the car. Id. These items were found in the car after the arrest of the suspects. 3RP 336. The phone may have fallen from his pocket as he quickly alighted the car. 2RP 139.

When Mr. Trerise got out, he ran toward his home, which was nearby. 2RP 139. As he ran, he noticed Bryceland and Angelo standing behind the car and noticed that they were not running away. Id. They were approximately ten feet from the gunman and had an unobstructed view of him. 2RP 167. As he ran passed them, Bryceland said "oh, run, run, run." 2RP 140; (speaker identified at 2RP 141). When he arrived home, Mr. Trerise became suspicious of the inaction and comments of Bryceland and Angelo, believing the incident was planned. 2RP 140-41. He reflected that the "Oh run" comment was said in a mocking fashion. Id. When he arrived at home, Mr. Trerise phoned the police. 2RP 141.[1]

Mr. Trerise saw the car still in the alleyway while on the phone

[1] A recording of the 911 call was admitted over defense objection and played for the jury at 2RP 146.

with the police. 2RP 147. The car had not left immediately after the robbery. Id. It was there in the alleyway for another two to three minutes. 2RP 148. Police soon responded and Mr. Trerise told them of the robbery and described the car. Id. After apprehension of the car, the police took Messrs. Trerise and Klug to a convenience store. 2RP 149. They positively identified the car and, looking inside, Mr. Trerise identified his things in the car. 2RP 150. He also identified the individuals, including Bryceland, who were at the robbery. 2RP 151. He told the police that he was reasonably certain that the gunman at the robbery was Chris Jones. 2RP 152.

Codefendant Angelo Lundy was granted testimonial immunity. 2RP 243-44. He testified that on the night of the robbery Bryceland had asked him to help move some furniture. 2RP 247. Bryceland was driving Christopher Jones's car when he picked up Lundy. 2RP 248. Jones was with Bryceland in the car at that time. 2RP 249. They drove to pick up Mr. Trerise with Bryceland driving, Jones in the passenger seat and Lundy in the back seat behind Bryceland. 2RP 250. Before arriving at the Trerise house, they dropped off Jones "[u]p the street from Hunter's." Id. Lundy stayed in the back seat. Id. They then drove "to the end of Hunter's street." 2RP 251.

They stopped in a dark alleyway near where they had dropped off Jones. Id. Bryceland said that he wanted to put something in the trunk.

2RP 252. After stopping, Bryceland got out, let Lundy out, and Lundy put the backpack in the trunk. 2RP 253. Then, Lundy saw someone approaching out of the darkness and heard that person say "give me all your stuff." 2RP 254. Lundy was unsure who the person was addressing and he took cover next to a garbage can. 2RP 255. He saw Messrs. Trerise and Klug run past him. 2RP 257-58. Seconds later, Lundy saw Bryceland in the car ready to leave. 2RP 259. At that point, Christopher Jones was back in the car. 2RP 260. Lundy did not see where the robber went or where Jones came from. Id. They drove to the ampm approximately seven minutes away and there was no discussion of what had just occurred. 2RP 261-62.

Detective Mathew Thuring of the Bremerton Police Department testified about his involvement in the investigation of this incident. He was advised that there were two victims and four suspects at the Bremerton Police Department. 2RP 278. He first interviewed Devon Klug. 2RP 279. He then interviewed Christopher Jones but got no useful information. 2RP 279-80. After having received some useful information in interviews with Lundy and Pry, Detective Thuring and another detective interview Bryceland. 2RP 280. Detective Thuring said that none of the four were very cooperative. 2RP 281.

Detective Thuring described Bryceland as both tired and "fidgety." Id. Bryceland "mumbled his words greatly and really talked in a lot of

circles." 2RP 281-82. He "kind of mumbled" in answering a question about why he was in the car. Id. When asked if Bryceland answered directly, Detective Thuring said "[t]hey were all kind of difficult, slow speech answers." Id. Bryceland identified the others in the car. Id. When asked if it was intended that anyone would get hurt, Bryceland responded that he did not think so. 2RP 284. Bryceland recognized the incident that he was being questioned about. Id. When asked if Jones intended any harm, Bryceland said he did not think so but asserted that he did not know Jones's mind. 2RP 285. Bryceland recalled that he had dropped off Jones but he did not know what Jones had done and then Jones was just back in the car. Id. He indicated that Jones had been giving him directions and he was following those directions. 2RP 286. None of Detective Thuring's observations about Bryceland's demeanor or manner of answering questions was used in the prosecutor's closing argument.

Detective Thuring testified that at some point he lost patience with Bryceland and ended the interview. Id. This because Bryceland was "talking in circles so much…his answers were very indefinite, just very frustrating. It was clear that -- to me that he was not really wanting to cooperate." 2RP 286. Bryceland claimed that he knew nothing about a gun that was found under the driver's seat in the car. 2RP 294.

The gun had been discovered under the driver's seat by Bremerton

Detective Beau Ayers when he searched the suspect vehicle. 3RP 330. It was in fact a BB gun. Id. The BB gun looked "very real," being a replica of a .45 caliber pistol. 3RP 331.

ARGUMENT

A. THERE WAS NO COMMENT ON SILENCE AND TESTIMONY ABOUT A DEFENDANT'S MANNER AND DEMEANOR WHILE NOT REMAINING SILENT IS ADMISSIBLE.

Bryceland argues that his conviction is infirm because Detective Thuring commented on Bryceland's silence in testimony before the jury. This claim is without merit because the detective never in fact commented on silence and testimony about a person's demeanor while speaking is admissible.

The Fifth Amendment provides, no person "shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution states, "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection of article I, section 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wash.2d 364, 374–75, 805 P.2d 211 (1991). The state may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. Id. at 236, 922 P.2d 1285. "Thus, 'a police witness may

not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions.' " *State v. Romero*, 113 Wash.App. 779, 787, 54 P.3d 1255 (2002) (quoting *State v. Lewis*, 130 Wash.2d 700, 705, 927 P.2d 235 (1996)).

1. The Detective did not comment on Bryceland's silence either directly or indirectly.

Bryceland argues that Detective Thuring either directly or indirectly commented on his silence. Bryceland argues the detective "directly commented on Bryceland's decision not to answer questions after he was advised of his right to remain silent," that "he did not respond to the detective's questions," and that he refused to answer questions. Brief at 8-9. A direct comment occurs when a witness or state agent makes reference to the defendant's invocation of his or her right to remain silent. *State v. Pottorff,* 138 Wn. App. 343, 346, 156 P.3d 955 (2007*) citing State v. Romero, supra,* at 793. An indirect comment on the right to remain silent occurs when a witness or state agent references a comment or action by the defendant which could be inferred as an attempt to exercise the right to remain silent. *Pottorff* at 347.

An indirect comment must cause prejudice to the defendant's right to a fair trial. *State v. Barry,* 183 Wn.2d 297, 303, 352 P.3d 161 (2015); s*ee State v. Lewis,* 130 Wn. App. 700, 705-06, 927 P.2d 235 (1996) (a *comment* on silence is used to infer guilt from that silence). Even an

impermissible direct comment does not warrant reversal if that direct comment is not exploited and used as substantive evidence of guilt. *Pottorff, supra,* at 347. Review of a direct comment applies a constitutional harmless error standard requiring that the comment be harmless beyond a reasonable doubt. *Lewis,* 130 Wn. App. 705-06. But "[p]rejudice resulting from an indirect comment is reviewed using the lower, nonconstitutional harmless error standard to determine whether no reasonable probability exists that the error affected the outcome." Id.

Here, the record does not support any of Bryceland's assertions about silence. First, there were no objections lodged by the defense during Detective Thuring's testimony. This issue is likely not preserved. Second, the lack of objection is easily explained by complete lack of testimony having to do with Bryceland's exercise of his right to remain silent. The record reveals that the detective at no time during his trial testimony referred to any question that Bryceland refused to answer or, more generally, to any occasion during his interview of Bryceland where Bryceland remained silent. The state can find no point in the case in which Bryceland was said to have exercised his right to remain silent.

In fact the trial court's unchallenged findings of fact from the CrR 3.5 hearing do not include any mention of Bryceland asserting and exercising either his clearly advised right to remain silent or his equally

clearly advised right to an attorney. CP 42-43. To the contrary, the trial court found that after proper advisement of his rights "that the Detective asked whether the Defendant wished to speak to him, the Defendant indicated that he did, and the interview commenced." CP 43.[2] By this finding and Detective Thuring's testimony it is clear that Bryceland waived his silence and did not refuse to answer questions and did in fact respond the detective's questions.

The detective's remarks were about the manner in which Bryceland did answer questions, not that he failed or refused to respond to questions. In *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the Supreme Court ruled that the defense may elicit testimony about the circumstances of a confession, saying "evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility." Id. at 691. Detective Thuring spoke of Bryceland's demeanor as tired and fidgety. 2RP 281. These observations required no question or answer and would be evident whether or not Bryceland remained silent. The detective said that his answers were mumbled. 2RP 281-82. The detective said that he gave "difficult, slow speech answers." Id. (emphasis added). He said that Bryceland was "talking in circles." 2RP 286 (emphasis added). He said that Bryceland

[2] This unchallenged finding is a verity on appeal. *McCleary v. State,* 173 Wn.2d 477,

gave "indefinite answers." Id. (emphasis added). He said that Bryceland's answers indicated that he did not wish to cooperate. Id. Thus, Detective Thuring's testimony did no more than relate Bryceland's manner and demeanor after Bryceland agreed to answer questions. On this record, then, there is no direct comment on Bryceland's assertion of his right to remain silent since Bryceland never invoked that right. The detective's testimony related the circumstances of Bryceland's statements allowing the jury full information in performing its duty to determine the weight and credibility it would give to the statements.

Such testimony, which never touches silence or refusal to answer, is unobjectionable.

> Courts have almost unanimously held that the Fifth Amendment does not protect evidence of a defendant's actions or demeanor (hereinafter, demeanor evidence), a conclusion consistent with Fifth Amendment jurisprudence and the plain meaning of "demeanor." Courts have determined that consideration of demeanor evidence is constitutionally barred only if the demeanor is testimonial, or if it is merely the demeanor accompanying a defendant's silence or failure to testify.

State v. Barry, 183 Wn.2d 297, 305, 352 P.3d 161 (2015) (footnote omitted). "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate factual assertions or disclose information." Id. at 309, *citing Doe v. United States,* 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). Moreover, demeanor is not

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514, 269 P.3d 227 (2012)

"inherently testimonial." 183 Wn.2d at 311. The *Barry* Court held that

> Ordinarily, a person's posture, a person's body language, and other aspects of his outward manner do not require that person to confront the *Muniz* trilemma of truth, falsity, or silence. And while facial expressions and body language might reveal someone's "state of mind" in the most general sense, they do not communicate specific "factual assertions" or "thoughts."

Id. at 311. In the present case, Detective Thuring's testimony did not comment on testimonial but nonverbal actions or demeanor of Bryceland. He related Bryceland's "outward manner" in Bryceland's verbalizations. Bryceland's demeanor was not testimonial in that it did not impart factual assertions or disclose information (other than the information of his demeanor). There was no testimony referencing any action by Bryceland that could be inferred to be an attempt to exercise his right to remain silent and thus there was no indirect comment on the right.

Further, Bryceland's reliance on *State v. Romero,* 113 Wn. App. 779, 54 P.3d 1255 (2002), is misplaced. The *Romero* Court engaged in a long analysis of situations wherein the state, by police testimony and argument, improperly burdened a defendant's silence by commenting on the same in a manner that allows an inference of guilt from that silence. Applying that analysis to the case before it, the court said:

> Applying our framework, Sergeant Rehfield testified directly as to Mr. Romero's post-arrest silence: "I read him his Miranda warnings, which he chose not to waive, would not talk to me." Sergeant Rehfield prefaced that remark with the observation that Mr. Romero had been "uncooperative." Defense counsel

> objected to the "uncooperative" comment, but the trial court did not instruct the jury to disregard it. Then, Sergeant Rehfield mentioned the Miranda warnings and Mr. Romero's decision not to waive his rights. The Sergeant concluded by observing that Mr. Romero would not talk to him. Even though no objection was taken, Sergeant Rehfield made a direct comment about Mr. Romero's election to remain silent. Thus, constitutional review is clearly warranted.

Id. at 793 (citation omitted). Romero would not waive his right to silence and the officer testified to that fact, including referring to it as uncooperative. Moreover, this violation occurred when "Mr. Romero's defense was built around his cooperativeness and openness with nothing to hide. . ." Id.

There Romero exercised his right to silence, the state commented thereon, and this was a constitutional violation. But, in the present case, Bryceland did not exercise his right to remain silent and, as a result, Detective Thuring did not comment on his silence. Since Bryceland did not in fact remain silent, Detective Thuring could not have directly commented on his exercise of the right. And, significantly, in the prosecutor's closing argument there is no reference to Detective Thuring or any of his comments about Bryceland's demeanor during the interview. 3RP 443-476; s*ee State v. Lewis,* 130 Wn.2d 700, 705-08, 927 P.2d 235 (1996) (comment on pre-arrest silence with no testimony or prosecution argument that the same allowed inference of guilt not reversible error). Thus, even if Detective Thuring's demeanor testimony may be squeezed

into the idea of an "indirect" comment, it remains that the state did not use that testimony as substantive evidence of guilt or in any way to infer guilt.

The evidence may have influenced the jury but not improperly. There is no dispute that there was a robbery. And the circumstances of the offense clearly show Bryceland was involved. This is true absent anything Detective Thuring said about his interview with Bryceland. There is no reasonable probability that the outcome would have been different. This claim fails both because it is not supported by the record and because Bryceland cannot show prejudice.

B. THE JAIL PHONE CALLS WERE ADMISSIBLE AND CONSTITUTED BRYCELAND'S OWN STATEMENTS AS ADOPTIVE ADMISSIONS DEMONSTRATING CONSCIOUSNESS OF GUILT.

Bryceland also claims that the admission of his discussions in recorded jail phone calls constitute an indirect comment on his silence. This issue includes the same conceptual difficulty found in his above claim regarding the detective's testimony: here, as there, Bryceland argues a negative impact on his right to silence when he in fact did not remain silent. However, there is a slight difference here. In this permutation, Bryceland argues that the right to silence is implicated in that Bryceland had a right to not testify. Brief at 11. Thus, he argues, the statements of an unidentified person, with no indication that that

unidentified person has credentials allowing the person to give legal advice or that the legal advice given is accurate, "created a prejudicial impression that Bryceland's exercise of his constitutional right to silence was more consistent with guilt than with innocence." Brief at 12.

First, it should be noted that the speaker on the phone call in no sense provided the jury with instructions as to the law. Any implication raised by this speaker that Bryceland needed to testify in order to explain the circumstances of the incident constituted at most a lay opinion as to how the lay person believed the trial would unfold. But the jury was instructed by the trial court that "It is also your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally believe the law should be." CP 57; instruction no. 1. Further, in the same instruction, the jury was told that "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Id. The jury was directly instructed that the trial court supplies the law in the case and directly instructed to disregard any statement or remark that is inconsistent with the law as provided by the trial judge. Thus, insofar as the jury might have taken the unknown speaker's opinions as remarks or statements about the law, they were instructed to disregard the same. Juror's are presumed to follow the

instructions of the court. *See State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

Of course, the particular instruction that the jury is presumed to follow on this issue is instruction 7: "The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him or her in any way." CP 65. Bryceland does not address this instruction or engage any explanation as to how the jury could have confounded the lay-person's musings with the law as instructed by the trial court.

But Bryceland embraced and adopted that there was a necessity of coming up with an explanation in his response that he had already thought of a story to address his presence at the robbery scene. The point for which the evidence was propounded was to elucidate Bryceland's state of mind regarding the robbery, decidedly not to raise an implication that he should testify. Further, the unidentified speaker never directly says that Bryceland needs to testify to his explanation. She does say that "you have to come up with…with like an answer," but does not say that you have to personally testify and provide the answer. Rather, the admonition is easily seen as directed to his defense in general. The speaker is telling him that his trial is unlikely to go well for him unless the defense can answer the difficult evidence against him.

Bryceland argues that the allegedly offending passages had no other purpose than to create an inference of guilt from his exercise of a constitutional right. Brief at 11. There are, however, other clear purposes for this evidence. First, the statements are admissible as adoptive admissions. ER 801(d) (2) excludes admissions by party-opponent from the hearsay rule. Subsection (ii) of that rule applies to "a statement of which the party has manifested an adoption or belief in its truth." Thus the adoptive admission rule:

> when a statement is made in the presence and hearing of an accused that is accusatory or incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and fact of his failure to deny, contradict, or object are admissible [in] a criminal trial as evidence of his acquiescence in its truth.

State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988) (alteration by the court) *rev denied* 110 Wn.2d 1025 (1988). Such admissions are not excluded by hearsay but, particularly with regard to admissions by silence, require a foundation that the defendant actually heard, understood and acquiesced in the statement. Id. at 551. Further, "[t]he circumstances must also be such that an innocent defendant would normally be induced to respond." Id. at 552. Once the foundation is lain, the jury decides whether or not the defendant actually adopted the statement. Id. at 551-52. Party-opponent admissions may be admitted as substantive evidence. *State v. Garland,* 169 Wn. App. 869, 886, 282 P.3d 1137 (2012).

Moreover, "there is general agreement that adoptive admissions of the defendant do not implicate the right of confrontation." *Neslund* at 554. This because the statements are admitted as the defendant's "even though couched in the words of a third person." Id. Thus, "[c]onstitutional confrontation rights are not implicated by the admission of the defendant's own incriminating out-of-court statements." Id.

Obviously, both the question or statement and the defendant's answer or comment in reply are admissible since it is the accusatory or incriminating question or statement that the defendant fails to deny that is relevant. 50 Wn. App. at 555. In the present case, the first objected to but admitted adoptive admission shows Bryceland's acquiescence in, or agreement with, the idea that he needs a story to explain his presence and activities at the time of the robbery. As an adoptive admission, this is considered Bryceland's own statement. *See Neslund, supra.* The second objected to but admitted passage shows that Bryceland is pinning his hopes of prevailing at trial on the eventuality that the complaining witness, Hunter Trerise, will not attend. Again, this is considered to be Bryceland's own statement. Moreover, it is difficult to see how this second remark implicates any Fifth Amendment concerns. It is simply true that the state's case requires Mr. Trerise's testimony.

Clearly, Bryceland heard and understood the statements about needing to address certain aspects of the case. Just as clearly, he adopted

the sentiment and made it his own, saying "yeah, I already came up with that." And, obviously, Bryceland is not heard to respond that he need not come up with a story because he was not involved in the robbery. Again, confrontation is not an issue because the adopted admission is considered the defendant's own statement. These are his statements by adoption and, absent voluntariness concerns, are as admissible as any other admission by a defendant.

Further, these statements, admissible as Bryceland's own, evince a consciousness of guilt. His admissions are relevant to his state of mind concerning the robbery. "A party's fraud or misconduct in the preparation or prosecution of a case is relevant to show guilt or the party's lack of belief in his or her cause." *State v. Sanchez,* 171 Wn. App. 518, 551, 288 P.3d 351 (2012), *citing* 5 *Karl B. Tegland, Washington Practice: Evidence Law and Practice* § 402.7, pp. 293-94 (5th ed. 2007). More generally, "[e]vidence of conduct such as resistance to arrest, concealment, and assumption of a false name is admissible if it allows a reasonable inference of consciousness of guilt of the charged crime." *State v. Freeburg,* 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001). Here, Bryceland is engaged in making up a story about his presence. And, his absent witness remark shows his lack of belief in his case. In any event, these remarks allow a reasonable inference of consciousness of guilt.

As was argued in the trial court (1RP 49), Bryceland did not deny

his participation in the robbery when discussing strategy for his trial. He in fact acquiesced in the need for explanation of his presence and asserted that he had already come up with such an explanation. Thus Bryceland's argument about the purpose of this evidence is half right: the evidence is in fact useful to bottom an inference of guilt. He is, however, also half wrong: this inference does not flow from the exercise of a constitutional right.

The record is clear that Bryceland knew that jail calls are not private. Nonetheless, he proceeded to discuss his case and in so doing adopted statements about his case. He does not demonstrate how or why his right to not testify was impugned. That is, he does not establish how these statements prejudiced his case to the jury in light of the above discussion of how the jury was charged by the trial court. Any juror may want to hear from the defendant at his trial but the system must rely on the presumption that that same juror will follow the trial court's instructions and make no inference from his failure to do so.

State v. Nemitz, 105 Wn. App. 205, 19 P.3d 480 is distinguishable from the present case. There, in a DUI prosecution, when arrested the defendant had referred to an attorney's business card which had on it the rights of an accused when she is arrested. Over defense objection, the trial court allowed the state to use the card in evidence. The Court reversed, holding that admission of the card could allow an inference that only

drunk drivers would need to take anticipatory steps to avoid self-incrimination. Id. at 215. The reason for the decision in *Nemitz* is captured in the Court's observation that "there was no probative value to the information contained on the lawyer's card regarding appropriate constitutional rights." Id. So the card was not relevant in the first instances. No discussion of other evidentiary purposes, like state of mind or consciousness of guilt, is found in the case. Moreover, it is manifest that the card did not constitute any sort of statement, adopted or direct, by the defendant; it is not an admission. As such, the card provides no evidence about the defendant or his case.

To the contrary, the evidence Bryceland assails in the present case all involves his own admissions, adopted or direct. And, as his own admissions, the evidence had probative value. Consciousness of guilt can be argued under circumstances such as these where a defendant discusses trial strategy in a none-private setting. Particularly where those discussion go to making up explanations about the incident and hoping that the state cannot prove its case. Again, here, it may be conceded that the evidence may have influenced the jury but, again, not improperly. The statements were admissible and this claim fails.

C. THE STATE WILL NOT SEEK APPELLATE COSTS IN THIS MATTER.

Bryceland next claims that this Court should not impose appellate costs should the state substantially prevail. The state concedes no anticipatory error in the imposition of costs. However, this office takes the pragmatic position that such costs are unlikely to be collected in any event. The state will not, therefore, seek costs on this appeal should the state substantially prevail.

III. CONCLUSION

For the foregoing reasons, Bryceland's conviction and sentence should be affirmed.

DATED January 4, 2017.

Respectfully submitted,

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Transmittal Letter

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Case Name: State of Washington v Kyle S. Bryceland

Court of Appeals Case Number: 48898-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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